

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

In Re:)	
)	Docket No. 2005-358-C
dPi Teleconnect, LLC v.)	
BellSouth Telecommunications, Inc.)	

REBUTTAL TESTIMONY OF TOM O’ROARK

1 **Q. Mr. O’Roark, have you reviewed BellSouth’s direct testimony?**

2 **A:** I have.

3 **Q: Overall, what is your response?**

4 **A:** First, as a housekeeping matter, I would like to address BellSouth’s treatment of
5 non-Line Connection Charge Waiver (“LCCW”) promotions, then respond to LCCW related
6 matters.

7 **Q. Very well. What about the non-LCCW promotions?**

8 **A.** For all practical purposes, they are irrelevant because discovery revealed the
9 dollar amounts related to these promotions to be so small. As a consequence, dPi performed no
10 analysis on the amounts applied for and denied under these promotions, and has similarly has
11 not bothered to review and analyze the points BellSouth presented in its testimony.

12 In fact, when dPi filed its testimony in this case, dPi indicated that it would only be
13 pursuing and providing evidence on the LCCW promotion. By that time, discovery in this case
14 had revealed that of the total amount in dispute, almost all (in the 90+% range) was connected
15 to a single promotion: the Line Connection Charge Waiver. Of those credits applied for under
16 the Line Connection Charge Waiver but denied, it was denied on the grounds that dPi’s orders
17 for Basic Service plus the Touchstar Blocking Features HBG, BCR, and BRD did not qualify for

1 the promotion because BellSouth did not count these features as “paid features.” Accordingly,
2 when dPi filed its testimony in this case it indicated that it would be addressing only the LCCW
3 promotion – because it does not make economic sense to spend thousands of dollars in attorney
4 time fighting over a few hundred dollars in credits applied for under multiple other promotions
5 and denied for multiple reasons.

6 Nonetheless, BellSouth has gone to some length to talk about dPi’s applying for these
7 credits. dPi has not spent the resources to disprove these claims. But two observations come
8 immediately to mind:

9 First, it is doubtful whether there really is a problem with the orders BellSouth complains
10 about. For example, with regards to the “double dipping” complaint that BellSouth emphasizes
11 at p. 14 of Mr. Ferguson’s testimony, in which credit requests were submitted in the same month
12 for accounts for both the LCCW (for new customers) and the SSCW (for existing customers)
13 promotions, note that *there are no restrictions in either promotion prohibiting an end user in*
14 *qualifying for both promotions in the same month.* An educated consumer is able to qualify
15 for the LCCW promotion by signing up for new service on January 1, 2005, and the very next
16 day, as an existing customer, qualify for the SSCW promotion.

17 Second, if there is a problem, the true source of the problem here lies not with dPi’s
18 billing agent’s computer search engines, but with BellSouth itself: BellSouth has created this
19 situation by refusing to bill the correct amounts for service orders at the time they are ordered,
20 and instead dropping a haystack of billing information upon dPi and requiring dPi to find the
21 needles that are the qualifying orders and submit those for refunds.

22 **Q. But it’s really the LCCW promotion that’s important to this case?**

1 A. Yes. By far, the main issue in this complaint is the Line Connection Charge
2 Waiver (“LCCW”) Promotion. It accounts for about 90+% of the total credits wrongfully denied
3 and thus it will be the focus of my rebuttal testimony.

4 **Q: Does focusing on the Line Connection Charge Waiver (“LCCW”) Promotion**
5 **simplify issues for the Commission?**

6
7 A: Vastly. As noted above, the dispute over this promotion accounts for more than
8 90+% of the dollars at issue between the parties. Frankly, the cost of litigation far surpasses the
9 minuscule amount at issue for the other two promotions. Had this been known earlier, these
10 claims likewise could have been dismissed earlier. From here out, dPi will concentrate only on
11 the LCCW promotions.

12 The vast majority of the time, dPi was denied credit under this promotion because
13 BellSouth refused to “count” as Touchstar features those features selected by dPi, such as the
14 Touchstar blocks. In fact, that is the basis for BellSouth’s denial of promotion credit 90+% of
15 the time.

16 **Q: So in short, this case is reduced to whether dPi is entitled to promotional credits**
17 **when it orders Basic Service plus Touchstar block features because it has “purchase[d]**
18 **... BellSouth Basic Service with at least one feature” and thus has “qualif[ied] for a waiver**
19 **of the local service connection fee.”**

20
21 A: Exactly. And there is no getting around the fact that dPi has in fact ordered Basic
22 Service with Touchstar features – because every line that dPi orders is a basic service line with
23 the Touchstar Blocking Features known by their USOCs of HBG, BCR, and BRD, unless the
24 customer order features that conflict with those features. If BellSouth did not wish its promotion
25 to apply to all Touchstar features, it should have (1) done like SBC (prior to its merger with
26 BellSouth), and alter its promotion so that the promotion specifically lists those features that

1 BellSouth requires to qualify for the promotion; and (2) it should not have waived the Line
2 Connection Charge for its own retail customers who order basic service plus the TouchStar
3 Blocking Features.

4 **Q: So what are your thoughts in response to BellSouth's contentions about why dPi is**
5 **not entitled to the promotion when it orders basic service plus the TouchStar Blocking**
6 **Features?**

7
8 A. I understand why they are fighting this – there's a lot of money at stake across the
9 entire BellSouth area of operations. But their contentions lack credibility, because the sequence
10 of events shows that the original interpretation of the promotion and application was exactly as
11 dPi has presented it, with BellSouth changing its interpretation only after it realized that the
12 original interpretation would result in it owing significant amounts to CLECs. Once BellSouth
13 realized that it faced a significant liability to CLECs, it advanced a series of rationales, one after
14 another, for why dPi's orders do not qualify. Each of these "justifications" were discredited in
15 turn, and new ones were generated.

16 **Q: Can you elaborate on this series of rationales BellSouth advanced as to why dPi's**
17 **orders did not qualify; and how, as each of these 'justifications' were discredited in turn,**
18 **new ones were generated?**

19
20 A. We know that BellSouth **did** originally interpret its promotion the as the plain
21 language reads, and as dPi contends it should be interpreted, for two reasons.

22 First, as described in earlier testimony, because Lost Key worked with BellSouth in
23 developing the automated system for processing these promotions. By December 2003 and
24 January 2004, Steve Watson was working on the LCCW promotion, and had batches containing
25 credit requests for orders for basic service plus the TouchStar Blocking Features approved. In
26 fact, in January, February, March, and April 2004, regular batches of such orders were approved

1 for Teleconnex (on whose behalf Steve Watson was working at the time), before Teleconnex was
2 taken over by other owners and ceased doing business. Then, in the summer of 2004, BellSouth
3 was crediting other CLECs (such as Budget Phone) with millions for promotional rates for orders
4 essentially identical to dPi's.

5 Second, we know from review of BellSouth's own retail ordering data that ***BellSouth did***
6 ***credit its own retail users who otherwise qualify for the promotion and take only basic service***
7 ***plus the BCR, BRD, and HBG TouchStar Blocking Features.*** Through discovery in Florida,
8 dPi sought records showing what non-recurring charges BellSouth charged its own end users
9 who (1) ordered new basic service and (2) any two of the BCR, BRD, and HBG TouchStar
10 Blocking Features (without any other TouchStar features). The response showed that from 2003
11 to August 2007, in any given month, for BellSouth end users ordering basic service plus the
12 TouchStar Blocking Features, BellSouth would waive the end users' Line Connection Charge
13 between 8.8% and 40.1% of the time. More particularly, for the time period from May 2003 to
14 January 2005, new BellSouth retail accounts created with basic service and 2 TouchStar
15 Blocking Features had their Line Connection Charge waived between 40% and 22% of the time.
16 Those new orders not receiving the waiver included orders that did not qualify because they were
17 not a "winover" or "reacquisition" (a requirement to qualify for LCCW); because they split off
18 of existing accounts; or the order were for accounts that were reestablished after being
19 disconnected – in other words, those orders not granted LCC waivers were for reasons *other* than
20 because BellSouth was not counting BCR and BRD as TouchStar features. A detailed
21 explanation of the data reviewed and the analysis of that data by Steven Tepera is found in dPi's

Exhibit 8. The frequency BellSouth awarded its end users LCCW is shown on three graphs in dPi's Exhibit 6.

Q. Can you elaborate about this parade of excuses BellSouth gave for evading extending the promotional pricing to dPi?

A. The first theory they came up with after months of study was to say that dPi's orders could not qualify because they were not win-overs or re-acquisitions, because they were new orders. *See* Seagle depo at 48. This approach was developed in the fall 2004 and very early 2005 (*see* Seagle depo at 55), but was abandoned in February of 2005 when it became clear that this approach would not work (*see* Seagle depo at 44-45, 51). Given the nature of its business – catering to credit challenged customers – essentially all of dPi's clientele are those who were once customers of BellSouth or other carriers but who were disconnected for failure to pay.

Q What was the next excuse offered after the “customers not winnover/reacquisition” excuse was abandoned?

A. As noted in my direct testimony, another reason initially advanced for not issuing the credits was for the supposed reason that the TouchStar Blocking Features dPi used to qualify for the LCCW were really not “features.” This reason was withdrawn (though it has now reappeared in sister states) after dPi pointed out that:

- by tariffed definition, “TouchStar service is” simply “a group of central office call management features offered in addition to basic telephone service” (Tariff at A13.19.1), and the items in question are undoubtably call management features – there is no other category of service to which they can be assigned;
- although BellSouth claims that the BCR, BRD, and HBG TouchStar Features cannot be considered features because they are blocks, the fact they are blocks does not mean the they are not features: blocks *are* features. The most glaring example is the A13.19.2 E Call Block feature from the tariff;

- 1 – the TouchStar Blocking Features appear in the South Carolina tariff (*e.g.*, at
- 2 A13.19.4 A. 1. (c),(f); A13.19.4 B. 1. (c),(f); (and various state tariffs) where
- 3 they are listed as features;
- 4
- 5 – they are specifically referred to as features in these tariffs;
- 6
- 7 – BellSouth employees repeatedly referred to these features as features during
- 8 communications between the parties; and
- 9
- 10 – BellSouth characteristically referred to and charged for these things as features
- 11 under the UNE regime.
- 12

13 **Q. What was the excuse offered after the “the TouchStar Blocking Features aren’t**
14 **really features excuse?**

15

16 A. The next approach was to claim that the promotion was not honored in situations

17 where the only things ordered were basic local service plus the TouchStar Blocking features.

18 Ms. Seagle conferred with Elizabeth Stockdale, a retail manager on the team, on this issue:

19 After I got into validating dPi and realized that these blocks were on here,

20 I did call Elizabeth Stockdale and said can you run this one down, it's

21 BCR, BRD, HBG. Find out what happens when people order those

22 blocks on their – with basic local service and that's it. She came back to

23 me and said we do not honor that. (Seagle depo 53).

24

25 While several months went into evaluating the winback/reacquisition “defense,” almost none

26 went into evaluating the “TouchStar Blocking Features don’t count” defense:

27 Q. Okay. How long did it take Elizabeth Stockdale's people or

28 Elizabeth Stockdale to get back to you with the information that you

29 wanted from her?

30

31 ***

32 A. Okay. Reacquisition was a couple of months of meetings.

33 There was a lot of other issues being discussed, like secondary service or

34 FR, but it was at least a couple months before we could come to any

35 conclusion, then of course they changed it.

36

37 With the block – with the blocks I want to say I don't have perfect

38 recall here, but I want to say the next day, within a day or two.

39

1 Q. So a very short turnaround compared to –

2

3 A. Yes. (Seagle depo at 55).

4 Note that the same information that would have been necessary to verify what BellSouth was
5 doing for its own customers – taking basic service plus the TouchStar Blocking Features – is the
6 same information that BellSouth resisted producing in Florida and Louisiana for months on the
7 grounds that it was too labor- and time- intensive to recover and evaluate. The conclusion to be
8 drawn here is obvious: no real evaluation was done here: someone just made a snap decision to
9 use this as the reason, as it sounded rational and defensible.

10 **Q. Well, isn't there a requirement that the TouchStar features be purchased "at**
11 **additional cost" as BellSouth says?**

12

13 A. No, not at all. This argument fails because BellSouth *is reading additional*
14 *requirements into its promotion criteria that simply aren't in the text.* According to the plain
15 language of the promotion, all dPi must do to qualify is

16 ... purchase[s] any one of the following [packages]:

17 [1] BellSouth® Complete Choice® plan,

18 [2] BellSouth® PreferredPack plan, or

19 [3] BellSouth® basic service and two (2) custom calling (or Touchstar®
20 service) local features.¹

21

22 Accordingly, dPi meets the requirements of the text of the promotion when it purchases the
23 combination of basic local service plus the two or more Touchstar block Features. For BellSouth
24 to impose added restrictions to these written terms – such as that the features must be “purchased
25 at additional cost” – imposes qualifying criteria that simply don't appear in the text.²

1

See dPi's Exhibit 2, 3.

2

In any event, the word “purchase” does not have the limited meaning – “to pay cash for” – which BellSouth seems to ascribe to it. Among other things, “purchase” includes:

1: to gain or acquire; to acquire (real property) by means other than descent or inheritance

1 BellSouth's argument that the HBG, BCR, and BRD TouchStar blocking features could
2 not possibly have been meant to count, since including them would be tantamount to giving
3 something away for free, and that BellSouth would therefore lose money, is either disingenuous
4 or inane: BellSouth routinely discounts things or waives charges in order to generate goodwill
5 and win business, and the entire purpose behind the promotion was to increase BellSouth's
6 market share at the expense of its competitors – as evidenced by the fact that the promotion was
7 directed only to “winover” or “reacquisition” customers. So BellSouth does “get something”
8 when it waives the line connection charge for these customers: it gains goodwill, it expects to
9 increase its customer base and market share – just as when it gives away promotional items at
10 sporting events. Waiving the sign up charge is a common method of getting new customers,
11 used not just by telephone companies but all sorts of other businesses – like Gold's Gym, for
12 instance. The drive is to get as many paying customers as they can.

13 Again, BellSouth's assertion that these items don't count because BellSouth would never
14 intend to give anything away for free when they do so all the time, and where they are in fact
15 attracting customers to rebuild their customer base, undermines BellSouth's credibility not just
16 on this issue, but on all other assertions it makes in this case.

17 Furthermore, if the Touchstar Blocking Features were originally intended not to be
18 “counted” towards fulfilling the promotion, BellSouth could easily have drafted its promotional
19 language to so specify – as it did before in other promotions/tariff sections, which point out that
20 the blocks could not be counted towards different discount pricing plans. The lack of such

2: to obtain by paying money or giving other valuable consideration [such as choosing to do business with one over another]. *See* Webster's; Merriam Webster law dictionary. “Purchase” also includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. *See* U.C.C. § 1-201(32). *Cf.* Securities Exchange Act § 3: the term “purchase” includes any contract to purchase or otherwise acquire.

1 limiting language indicates BellSouth did not consider these features as not counting towards the
2 promotion.

3 Alternatively, BellSouth could have specifically listed those limited features which it
4 would allow to qualify for the promotion (i.e., “choose any two from the following list...”). But
5 BellSouth did **not** so limit the list of features from which one could choose. Again, this lack of
6 limiting language indicates BellSouth did not consider these features as not counting towards the
7 promotion.

8 Note also that BellSouth relies heavily on the fact that the North Carolina Utilities
9 Commission initially decided that dPi was not entitled to the LCCW credit because the North
10 Carolina Utilities Commission found that BellSouth did not actually provide the credit to its end
11 users with identical orders as dPi’s customers. The North Carolina Commission’s decision was,
12 however, founded upon BellSouth’s Pam Titpon’s testimony that the BellSouth did not waive
13 the Line Connection Charge for its end users taking basic service plus the TouchStar Blocking
14 Features, which the North Carolina Commission found to be “dispositive.”

15 **Q. What’s the latest excuse now that the “yeah, but these TouchStar blocking features**
16 **weren’t purchased at additional cost” has been debunked?**

17
18 A. The latest excuse, which has come up only after the litigation started, appears to
19 be that if *dPi’s customers* don’t specifically request the blocks *from dPi* (like BellSouth end users
20 would supposedly do when ordering from BellSouth), then BellSouth is not required to extend
21 the promotion to dPi. This position is simply a trap to confuse the unwary and the poorly
22 informed.

23 **Q. Why do you say BellSouth’s contention that it need only extend the promotion to**
24 **end users of dPi’s who have specifically requested these features is a trap to confuse the**
25 **unwary and the poorly informed ?**

1 A. One must remember that the service plans dPi provides its customers is not a
2 clone of BellSouth's tariff; dPi picks the services that it wishes to resell and repackages them for
3 resale. dPi's service offerings do not directly mirror AT&T's. dPi's basic package is designed
4 to provide a guaranteed fixed price for basic service without the possibility additional charges
5 being added to the bill by the customer (or another user of the customer's phone) accessing fee-
6 per-use services. In order to provide customers requesting this fixed price product, dPi places
7 the necessary universal service order codes that limit a customer from experiencing usage
8 charges such as call return, repeat dialing and/or call tracing on such orders – unless the end
9 users chooses a level of service that would entitle him or her to one or another of those features
10 that would otherwise be blocked. The customer is not informed of the technical details of how
11 the order must be provisioned to deliver the level of service requested; however, in requesting
12 dPi's product, the customer is requesting the blocks (and whatever technical provisioning
13 mechanisms are necessary) to ensure that the product is fixed priced.

14 In any event, BellSouth cannot legally impose these restrictions on a CLEC's ability to
15 resell these services at the wholesale discount. Conditioning dPi's eligibility for the promotions
16 upon a verification of *dPi's relations with third parties* (e.g., whether dPi's customers
17 specifically request the TouchStar Blocking Features by name, and whether dPi passes on all or
18 some of the promotional savings to its customers) both violates the law and contradicts the
19 overarching general provisions of the contract. Under the law, whatever retail offers BellSouth
20 makes to its customers, it must make available to CLECs. If a retail customer can obtain service
21 a certain way from BellSouth for a certain price, the CLEC obtaining the same service the same
22 way to resell is entitled to the same price, less the avoided cost discount. For BellSouth, CLECs

1 are the end user; CLEC customers are unrelated third parties. BellSouth's contention that it can
2 require additional requirements is extrapolated from a single footnote to a chart in the ICA,
3 which provides that "Where available for resale, promotions will be made available only to End
4 Users who would have qualified for the promotion had it been provided by BellSouth directly."
5 The best interpretation of this footnote is that the only resale orders that will qualify for
6 promotional pricing are those that would qualify for promotional pricing had they been made by
7 a BellSouth end user directly. Interpreting this footnote in the way now suggested by BellSouth
8 – as conditioning dPi's eligibility for the promotions upon a verification of *dPi's relations with*
9 *third parties* (e.g., whether dPi's customers specifically request the TouchStar Blocking Features
10 by name, and whether dPi passes on all or some of the promotional savings to its customers) –
11 both violates the law, and contradicts the overarching general provisions of the contract, such
12 as the Resale Attachment's General Provision section 3.1:

13 ...Subject to effective and applicable FCC and Commission rules and
14 orders, *BellSouth shall make available to DPI for resale those*
15 *telecommunications services BellSouth makes available...to customers*
16 *who are not telecommunications carriers.*

17
18 **Q: Does this conclude your testimony?**

19 **A:** Yes – for now. But I reserve the right to supplement or amend it at hearing.